

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In re the Matter of)

MM Docket No. 94-123

Review of the Prime Time Access Rule,)
Section 73.658(k) of the Commission's Rules)

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COMMENTS OF
THE COALITION TO ENHANCE DIVERSITY

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TABLE OF CONTENTS

	<u>Page(s)</u>
SUMMARY	iii
I. INTRODUCTION	2
II. THE VIDEO MARKETPLACE AND PTAR	4
A. The Purposes Of PTAR	4
B. Marketplace Changes Since 1970	6
1. Structural Changes	7
2. Changes In The Program Production And Acquisition Process ..	9
III. FAR FROM FURTHERING THE PUBLIC INTEREST, PTAR'S OFF-NETWORK RESTRICTION AFFIRMATIVELY DISSERVES THE PUBLIC INTEREST AND THEREFORE SHOULD BE ELIMINATED	11
A. The Off-Network Restriction's Continuing Protection Of First-Run Syndication Cannot Be Justified	11
B. Elimination Of The Off-Network Restriction Will Encourage Additional Entry Into, And Investment In, The Production Of Network Programming	15
1. The Off-Network Restriction Has Reduced Prices For Off- Network Product	16
2. Elimination Of The Off-Network Restriction Will Encourage Entry And Investment In Network Prime Time Programming ...	19
3. The Off-Network Restriction Has Created Perverse Distinctions Between Similar Programs	20
C. Elimination Of The Off-Network Restriction Will Give Affiliates Greater Choice In Program Selection	21
D. Elimination Of The Off-Network Restriction Will Not Threaten The Independent Television Industry	23
1. Independent Television Is No Longer In Its Infancy	24

	<u>Page(s)</u>
2. The Majority Of Independent Stations In The Top 50 Markets No Longer Suffer From The "Inherent Competitive Disadvantage" Of Over-the-Air UHF Reception	26
IV. THE NETWORK RESTRICTION CONTINUES TO SERVE THE PUBLIC INTEREST AND THEREFORE SHOULD BE RETAINED.....	29
A. The Networks Retain The Ability To Force Affiliates To Accept Network Programs	31
B. The Benefits Of Lifting The Off-Network Restriction Will Be Undermined If The Networks Are Allowed To Program The Access Hour	35
C. The Network Restriction Continues To Serve The Commission's Interest In Promoting Diversity	35
V. CONCLUSION	40

Exhibit A Coalition Membership List

Figure 1	Average Local Advertising Revenues for Selected Syndicated Shows in the Top 75 Markets; Six Months ending October 1994
Figure 2	Top 50 Markets - All First-Run Programming - On Affiliates in Access, M-F 7:00 - 8:00 PM E.S.T.)
Figure 3	Fox Affiliates Top 50 Markets, M-F 10:00 - 11:00 PM (E.S.T.)
Figure 4	Fox Affiliates Top 50 Markets, M-F Access
Figure 5	Off-Network and Off-Fox Sitcoms - Syndication Fees 1989-1994
Figure 6	1994/95 Season - Station Affiliations in the Top 50 Markets
Figure 7	Top 50 VHF to UHF Established Network Affiliation Changes
Figure 8	Affiliate Access Programming Markets 1-50 and 1-100

SUMMARY

The Commission is correct when it notes that the television industry has changed very significantly since the Prime Time Access Rule (PTAR) was adopted more than two decades ago. For example, while in 1970 there were only 82 stations not affiliated with ABC, NBC or CBS, today there are more than 450 such stations. While first-run syndicated programming had virtually disappeared, it is now thriving. And while cable was merely an embryonic transmission system, it now passes over 96 percent of television households.

The key question, as the Commission recognizes, is whether the multitude of changes has obviated the need for regulation. The answer, as we will show, differs depending upon which portion of PTAR -- the off-network restriction or the network restriction -- is analyzed. Marketplace changes have, in fact, rendered the off-network restriction an unnecessary and even harmful regulation. These changes have not, however, vitiated the need for the network restriction.

The off-network restriction was designed to jump-start the first-run syndication industry, which was then in its infancy. Twenty-five years have passed, however, and that industry has now grown up. The benefits that the restriction were intended to achieve are sufficiently secure that elimination of the restriction will not place them in danger. First-run syndicators such as King World and Paramount, for example, are fully equipped to compete in the marketplace without continuing government support. The Commission, likewise, need not worry that elimination of the off-network restriction will impair the viability of the independent television industry. The vast majority of these formerly independent stations are

part of station groups or affiliated with one of the new networks (or both). As a result, they are more financially secure today than they were in 1970.

The fact that 25 years of government support provides sufficient succor for any infant industry is only part of the reason the off-network restriction should be eliminated. This restriction has also resulted in unintended, anomalous results that will be ameliorated only if the restriction is eliminated. By removing the off-network restriction, for example, the Commission will eliminate an artificial constraint on the prices that prime time network programs command in off-network syndication, and thereby ensure the level of investment in prime time programming that viewers demand and deserve.

One of the clearest signs that the off-network restriction is now a relic of the past is that it results in grossly disparate treatment of similar programs, without any plausible justification or demonstrable viewer benefit. In 1991, for example, Fox's *Married...With Children* garnered syndication fees of approximately \$2.4 million per episode. In contrast, ABC's *Roseanne*, a similar program in terms of demographics and ratings earned \$1.8 million per episode just one year later. The primary reason for the difference: *Roseanne* is subject to the off-network restriction, while *Married...With Children* is not.

Similarly, although the off-network restriction was intended as a way to help weaker UHF stations, it now operates perversely in a number of markets where independent stations have become VHF stations. In Detroit, for example, Channel 2, a Fox affiliate, is free to broadcast any program it wishes during the access hour. Channel 62, a CBS affiliate, by contrast, may not air off-network programming during that hour. There is no policy

justification for this disparate treatment. Because the public interest is now harmed, not served, by continuing enforcement of the off-network restriction, the Commission should eliminate the restriction immediately.

Unlike the off-network restriction, the network restriction continues to serve the public interest. Marketplace changes have not altered the fact that, absent the network restriction, affiliates will have little choice but to air network programming offered for broadcast during the access hour. In this event, however, the benefits achieved by eliminating the off-network restriction will be lost.

Preservation of the network restriction will also serve the Commission's goal of promoting diversity by removing the "network funnel" for at least a small amount of programming. The restriction allows the network affiliates to broadcast programming that is from more diverse sources and is better suited to local tastes. The Commission should retain the network restriction until it can be shown that, as a result of further changes in the television industry, the restriction's diversity benefits will not be sacrificed by its repeal. That day, however, clearly has not yet arrived.

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To: The Commission

**COMMENTS OF
THE COALITION TO ENHANCE DIVERSITY**

The Coalition to Enhance Diversity (the "Coalition"), on its own behalf and on behalf of its members, hereby submits these comments in response to the Commission's Notice of Proposed Rulemaking ("NPRM") in the above referenced proceeding.¹ The Coalition is a broad-based group of individuals and entities involved in the production, distribution and broadcasting of television programs. The Coalition includes producers of all sizes, ranging from individual producers (both newcomers and established) to production companies (both major studios and smaller entities). The Coalition is composed, for example, of such diverse producers as Stephen Cannell, Fred Silverman, Warren Bell, Witt-Thomas-Harris Productions, Miller-Boyett Productions, MCA Inc., and The Walt Disney Company. The Coalition also includes trade unions whose members are involved in the production of television programs

¹ *Review of the Prime Time Access Rule, Section 73.658(k) of the Commission's Rules, FCC 94-266 (released Oct. 25, 1994) (hereinafter "NPRM").*

(e.g., Screen Actors Guild, Writers Guild of America, west and Writers Guild of America, east). And it includes owners of network affiliates (e.g., Scripps Howard Broadcasting Co. and Pulitzer Broadcasting Co.) and their affiliated stations.²

I. INTRODUCTION

In the NPRM, the Commission proposes an analytical framework for evaluating the continued need for PTAR. The Commission begins by noting that "[i]n 1970, there was a strong case for taking government action to correct the effects of a competitively unbalanced market."³ That action came in the form of PTAR, which essentially sought to serve the public interest by reducing network dominance and increasing program diversity in "three . . . ways": First, PTAR was designed to strengthen existing independent producers⁴ and encourage the entry of new ones, by reserving a portion of prime time when producers could sell directly to television stations rather than through the network funnel.⁵ Second, the rule was designed to strengthen the affiliates' autonomy in making programming decisions for a portion of prime time, by reducing the networks' ability to dictate that decision.⁶ And, third, the rule was designed to strengthen independent stations.⁷ In its NPRM, the Commission asks

2 A complete list of the Coalition members is set forth at Exhibit A.

3 NPRM at ¶ 32.

4 *Id.* at ¶ 31. The Commission appears to use "independent producers" to mean producers who are independent of the three established networks. We use the term with the same intended meaning.

5 *Id.*

6 *Id.*

7 *Id.*

commenters to focus on these three purposes of PTAR and, with respect to each, to analyze "the intended and unintended effects" of PTAR.⁸

In these Comments, the Coalition analyzes the effects of PTAR using two alternative analytical frameworks, both of which were suggested by the Commission. First, as the Commission requests, we analyze the "intended and unintended" effects of PTAR on independent producers, affiliates and independent stations. Second, as set out more fully in the attached comments of Professors Oliver Williamson and Glenn Woroch, we analyze the effects of the rule from an economic efficiency perspective.⁹

In both cases, we analyze separately the two distinct components that comprise PTAR -- the off-network restriction and the network restriction. The off-network restriction limits network affiliates' freedom by preventing those affiliates in the Top 50 markets from airing off-network syndicated programming during the access period. The network restriction, by contrast, restricts network conduct by limiting the number of prime time hours during which the networks may provide a program feed to their affiliates in the Top 50 markets.

8 *Id.* at ¶ 32.

9 Oliver E. Williamson is the Edgar F. Kaiser Professor of Business Administration, Professor of Economics and Professor of Law at the University of California-Berkeley; Glenn A. Woroch is a Visiting Professor of Economics at the University of California-Berkeley. In their comments, "A Comparative Efficiency Analysis of the FCC's Prime Time Access Rule" (hereinafter "Williamson and Woroch"), Professors Williamson and Woroch accept the Commission's invitation to evaluate the rule from an economic efficiency perspective, *see* NPRM at ¶¶ 32, 49, and employ a "comparative efficiency" approach. Using this approach, Professors Williamson and Woroch analyze traditional economic efficiency considerations as well as the contractual, organizational and regulatory efficiency implications of the rule.

With respect to each restriction, we analyze its original objective and, as the Commission requests, also analyze its impact -- including any unintended effects.

Under either analytical framework, our analysis yields the same results: The off-network restriction has outlived whatever useful purpose it may once have served, and now has unintended negative consequences that contravene the very goals of the rule. It should therefore be eliminated. The network restriction, by contrast, continues to serve the public interest and should be retained.

II. THE VIDEO MARKETPLACE AND PTAR

A. The Purposes Of PTAR

Prior to the adoption of PTAR,

three national network corporations not only in large measure determine[d] what the American people [would] see and hear during the hours when most Americans view[ed] television but also [] appear[ed] to have unnecessarily and unduly foreclosed access to other sources of programs.¹⁰

The Commission determined that an exercise of its rulemaking authority was necessary to reduce this competitive imbalance and "to encourage the growth of alternate sources of television programs for both network and non-network exhibition."¹¹ The Commission's goal, therefore, was to introduce additional competitors into the market and thereby to expand the array of programming choices ultimately available to viewers.

¹⁰ *Amendment of Part 73 of the Commission's Rules and Regulations with Respect to Competition and Responsibility in Network Television Broadcasting*, 45 F.C.C.2d 2146, 2147 (1965).

¹¹ *Id.*

To achieve this goal, the Commission "open[ed] access to the Top 50 markets for independent programming" by prohibiting the networks from providing programming to their affiliates for one hour during the critical prime time period.¹² The Commission concluded that providing independent producers "the opportunity to develop their full economic and creative potential under better competitive conditions than [were then] available to them"¹³ would encourage the entry of new producers. The Commission further found that the resulting increase in the number of independent producers would provide a "substantial benefit to the public interest in television broadcast service."¹⁴

Absent regulation, the Commission found that the networks had "a tremendous and, we believe, insurmountable advantage in providing programs for their affiliates. Not only is there the natural tendency of an affiliate to do more business with its dominant supplier, but the program distribution process is much simpler via a network."¹⁵ PTAR was adopted to provide independent producers direct access to the network affiliates during one hour of prime time.

12 *Amendment of Part 73 of the Commission's Rules with Respect to Competition and Responsibility in Network Television Broadcasting*, 23 F.C.C.2d 382, 394 (1970) ("PTAR I"). As the Commission noted in the NPRM, the Rule was adopted in conjunction with the Financial Interest and Syndication Rule, which subsequently has been relaxed in large part and currently is scheduled to expire completely in November of 1995. See NPRM at n.6.

13 *PTAR I* at 397.

14 *Id.*

15 *Id.* at 386-87.

The Commission anticipated that its "modest action" of "provid[ing] a healthy impetus to the development of independent program sources" would also provide "concomitant benefits in an increased supply of programs for independent (and, indeed, affiliated) stations."¹⁶ By encouraging the entry of new producers and thereby the supply of programs available to independent stations, the Commission sought to strengthen the competitive position of those stations as alternatives to the three networks.

The Commission also anticipated that its action would increase program diversity by "removing the three-network funnel" for the access hour.¹⁷ The Commission explained that, rather than allowing the networks to make all the programming decisions, "the licensee will decide which among available sources of programs he will patronize."¹⁸ By allowing the affiliates to "exercise something more than a nominal choice in selecting . . . program[ming]," the Commission hoped that "diversity of program ideas [would] be encouraged."¹⁹

B. Marketplace Changes Since 1970

The Commission properly recognizes that substantial changes have occurred in the intervening years since the rule was adopted in 1970.²⁰ These changes include structural changes, as well as changes in the manner in which network programs are produced and

¹⁶ *Id.* at 395.

¹⁷ *Id.*

¹⁸ *Id.* at 397.

¹⁹ *Id.* at 397, 395.

²⁰ NPRM at ¶ 3.

acquired. Given the enormity of these changes, the Commission has appropriately undertaken this review to determine whether continued regulation is needed. The critical question is whether the television industry has evolved in such a way as to warrant elimination or modification of the rule. We therefore begin with a brief review of the more significant and salient changes that have occurred in the television industry since 1970.

1. Structural Changes

As the Commission notes, independent stations have grown dramatically in number in the last 25 years, from 82 in 1970 to over 450 today.²¹ In addition, first-run syndicated programming, which had "virtual[ly] disappear[ed]" in 1970,²² now dominates the syndicated ratings.²³ In 1994, 181 first-run syndicated programs aired,²⁴ and 18 of the 25 most popular syndicated programs were first-run.²⁵ As anyone who visited the NATPE convention this year (or any recent year) can attest, the first-run syndication market is thriving. Indeed, syndicators at this year's convention offered close to 100 new first-run programs, in addition to the multitude of first-run programs that are already on the air.

The number of national networks has also grown since 1970. Significantly, one of these new networks -- Fox -- now airs a substantial amount of programming that

²¹ *Id.* at ¶ 16.

²² *PTAR I* at 385.

²³ *NPRM* at ¶ 19.

²⁴ Nielsen Syndication Service, Cassandra Coverage Area Ranking Report, Nov. 1994.

²⁵ *Id.*

subsequently enters the off-network market. The Commission's description of Fox as a "near" network²⁶ is therefore apt. Fox is now in essentially the same league as ABC, CBS and NBC with respect to the purchase of programming for its prime time network feed.²⁷ At the same time, however, because Fox is not considered a network for purposes of PTAR,²⁸ programs coming off of its network can be broadcast by ABC, CBS and NBC affiliates in the Top 50 markets during the access period. In addition, all of the Fox affiliates are free to air off-network programs during that time period. In the syndication marketplace, therefore, Fox stations are still considered independent stations -- at least for access period purchases.

When it issued its NPRM, the Commission observed that two new networks had announced plans to enter the marketplace. Those networks -- the WB and UPN -- have, in fact, subsequently begun broadcasting. They are, as the Commission notes, only "incipient" networks.²⁹ Currently, they provide a network feed only one and two nights per week, respectively; and neither has a reach comparable to ABC, CBS, NBC, or Fox.³⁰ Nonetheless, the time periods during which

26 NPRM at ¶ 48.

27 Fox's prime time schedule airs on 189 stations (including one in each of the Top 50 markets) covering 96 percent of the country. Nielsen Television Index, 1994-95 Season (through Feb. 26, 1995). In 21 of the Top 50 markets, Fox's affiliate is -- or will shortly be -- a VHF station. *See infra* p. 26.

28 The Commission defines a "television network" as "any person, entity, or corporation providing on a regular basis more than fifteen (15) hours of prime time programming per week . . . to interconnected affiliates that reach, in aggregate, at least seventy-five (75) percent of television households nationwide." 47 C.F.R. § 73.662(f) (1994). By not broadcasting more than 15 hours of prime time programming per week, Fox is not subject to PTAR.

29 NPRM at ¶ 47.

30 The WB has a 78 percent nationwide reach when the WGN superstation feed is included; UPN has an 83 percent nationwide reach. Nielsen Television Index, Jan.-Feb. 1995.

they provide a network feed are now essentially off-limits to syndicators and, if the programs airing on these incipient networks are successful, they will in four years contribute to the increasingly large supply of programming in the off-network syndication market.³¹

2. Changes In The Program Production And Acquisition Process

As the Commission recognizes in its NPRM, "an understanding of how the market for the purchase and sale of programs operates" is critical to assessing the continued efficacy of PTAR.³² Indeed, the acquisition process for network programs governs the manner in which producers earn profits and, therefore, significantly affects their incentives to enter and invest in the business. Before turning to our evaluation of the rule, therefore, we briefly describe the program acquisition process, which has also undergone significant change since 1970.

In exchange for the right to air a program on its network, the network pays the producer a license fee. In 1970, that fee typically covered the producer's costs. Today, by contrast, the network license fee typically covers only a portion (usually 70 percent) of the producer's costs. Most producers therefore incur substantial deficits as a result of the gap between the production costs and the license fees paid by the network. These deficits can be as large as \$225,000 *per episode* for a half-hour program and as much as \$400,000 *per episode* for hour programs.

The producer's ability to sell the reruns of its program in syndication is thus critical to the producer's ability both to recoup its costs and to earn any profit.³³ An episodic

31 So long as they remain at the 15-hour threshold, moreover, like Fox, their programs (and their affiliates) will not be subject to PTAR.

32 NPRM at ¶ 4.

33 "[T]he goal of every series is to produce enough episodes to be saleable in syndication. Studios initially lose money producing series; they make all their profits in syndication." Bill Carter, *Big Shifts in Network-Studio Relationships*, New York Times, Apr. 27, 1992 at D8.

series cannot typically be sold in domestic syndication, however, unless it has accumulated at least 80-100 episodes.³⁴ Given current network purchasing practices, a series generally must run at least four years to be marketable in off-network syndication. Only a small percentage of network programs actually stay on the network long enough to make it to syndication and therefore have a chance to earn a profit, however.³⁵ Consequently, producers must rely on the syndication fees from the few series that do survive to syndication to cover not only those programs' deficits but the deficits of the unsuccessful programs and the development costs of new programs as well.

In short, over the past 25 years off-network syndication revenues have become significantly more important to a producer's ability to continue to produce programs for network exhibition. The producer's ability to place those stripped programs in one of the time periods that earns the highest syndication fees -- specifically, the access period -- is thus significantly more important today than it was in 1970.

34 Because of the economics of the domestic off-network syndication market, stations broadcast such programming five times a week at the same time each day, a practice known as "stripping." With 80-100 episodes, each episode is repeated only once every 16-20 weeks. Fewer episodes would result in episodes being repeated more frequently than most viewers tolerate.

35 Approximately 70 percent of new network shows are cancelled in their first year and an additional ten percent of network shows are cancelled in their second year. Thus, only a small fraction of all series (typically, one in six) actually make it to off-network syndication.

**III. FAR FROM FURTHERING THE PUBLIC INTEREST,
PTAR'S OFF-NETWORK RESTRICTION AFFIRMATIVELY
DISSERVES THE PUBLIC INTEREST AND
THEREFORE SHOULD BE ELIMINATED**

When the effect of the off-network restriction on producers, affiliates and independent stations is examined, it is plain that this restriction no longer serves the public interest. As explained below, the benefits that the restriction were intended to achieve are sufficiently secure that elimination of the restriction will not place them in danger. At the same time, the off-network restriction has resulted in unintended, anomalous effects that can be ameliorated only by its elimination.

**A. The Off-Network Restriction's Continuing Protection Of
First-Run Syndication Cannot Be Justified**

In 1970, the Commission theorized that the off-network restriction would help "jump-start" the first-run syndication industry. Specifically, in order to ensure that first-run syndicators had an adequate base of customers to which they could sell their programming,³⁶ the Commission prohibited network affiliates in the Top 50 markets from airing off-network programs during the access hour. Network affiliates in these markets were instead required either to air first-run syndicated programming or to produce (or acquire) local programming for the access hour. The effect of this restriction, therefore, has been to cordon off from competition 900 extremely valuable hours of broadcasting time each week for the benefit of first-run syndicators.³⁷

³⁶ *PTAR I* at 394-95.

³⁷ The 900 hours comprise six hours of access programming per week on three networks in 50 markets. On Sundays, each of the three networks runs programming during the access period that is exempt from the PTAR restrictions.

The Commission need not decide whether the off-network component of PTAR provided, in fact, a critical impetus to the growth in first-run syndication. Rather, the Commission needs to decide whether -- in light of the passage of time and the robustness of the industry today -- there is any justification for preserving the off-network restriction.

Governmental regulation that is designed to support "infant industries," as Professors Williamson and Woroch observe, must eventually expire.³⁸ The purpose of such regulation, after all, is to enable fledgling firms to grow to a size sufficient to be self-sustaining. Once the government has given these firms sufficient opportunity to develop the size, skills and resources required to be viable competitors, therefore, the regulatory protection should be withdrawn. Some of the new entrants may succeed, others may fail. But this is true of all firms, incumbents and entrants alike. The fact that some new entrants ultimately fail simply reflects the workings of the market, not the failure of regulation. To conclude otherwise would be to transform an agency's decision to provide initial support to an infant industry into a requirement that the agency provide perpetual protection for a particular class of competitors. No principle of economics or sound regulatory policy can be marshalled to support such a perverse result.³⁹

38 Williamson and Woroch at 19-20. For the reasons discussed below, neither of the PTAR restrictions can be justified on "infant industry" grounds. *Id.* at 20-21. There are other policy reasons, however, to preserve the network restriction. See Section IV below.

39 The D.C. Circuit, for example, has noted in reviewing the Commission's must-carry regulation that the Commission's proper concern is the viability of local "broadcasting," not individual local "broadcasters." *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1460 (D.C. Cir. 1985), *cert. denied.*, *National Ass'n of Broadcasters v. Quincy Cable TV, Inc.*, 476 U.S. 1169 (1986). Similarly, the Commission decided to repeal the "Carroll doctrine," under which the Commission could, when approving an application for a new broadcast station, consider proof offered by an incumbent licensee in the market of the detrimental economic effect of a new licensee. Significantly, the Commission (Footnote 39 Continued)

PTAR's off-network restriction has been providing economic support to the first-run syndication business for two decades. As Professors Williamson and Woroch observe, even if the television industry had not changed in any respect since the rule was adopted, 25 years of economic assistance provides sufficient opportunity for an infant industry to develop to its full potential.⁴⁰ The fact that there have been significant changes in the television industry during this period serves only to strengthen the conclusion that the off-network restriction is no longer justified.⁴¹

There is no question that today the first-run syndication industry is robust, producing highly popular programs, as demonstrated by the ratings and advertising revenues that these programs generate for local stations. See Figure 1. Indeed, during the access period, 98.6% of first-run programs aired by Top 50 affiliates are currently produced by four companies: King World and Paramount (which together produce more than 80 percent), Fox, and Warner Bros. See Figure 2. These companies are all financially strong and are well-equipped to compete in the marketplace without continuing government protection.⁴² There is simply no basis for the Commission to conclude that elimination of the off-network

(Footnote 39 Continued)

never found a case that justified application of the doctrine. *Policies Regarding Detrimental Effects of Proposed New Broadcast Stations on Existing Stations*, 3 FCC Rcd 638 (1988), *recon. denied.*, 4 FCC Rcd 2276 (1989).

⁴⁰ Williamson and Woroch at 21.

⁴¹ *Id.*

⁴² King World, for example, reported net income of \$27.9 million for the first quarter of fiscal year 1994-95 on revenues of \$147.1 million. Martin Peers, *King World Posts 12% Earnings Gain*, Daily Variety, Jan. 18, 1995 at 4.

restriction will have a "severe, and perhaps crippling" effect on this industry, as King World claims.⁴³ Indeed, all the evidence is to the contrary.

For example, an examination of the fifty largest markets in which PTAR does *not* apply -- markets 51-100 -- reveals that first-run programs constitute 76 percent of the syndicated programs broadcast by network affiliates during the access hour.⁴⁴ In addition, some of Cap Cities' owned stations recently demonstrated their commitment to broadcasting first-run syndicated programming during the access hour when they signed long-term agreements committing to *Wheel of Fortune* and *Jeopardy* until the year 2000,⁴⁵ even though they were undoubtedly aware that the off-network restriction might be eliminated. These facts explain why, despite the dire predictions King World makes to the FCC, one of its executives announced in 1992 that "[i]f [PTAR] were to change, we don't think there would be any significant impact on our shows."⁴⁶

43 King World Comments, June 14, 1994 at 2. Indeed, a similar King World prediction has already been proven wrong. King World earlier predicted that the pendency of even a Notice of Inquiry concerning PTAR would have a negative impact on the production of new, first-run syndicated programming. *Id.* at 2, 7. Yet, three months after the Commission adopted the NPRM, the NATPE convention was described as "the biggest . . . ever" with "program sales at a volume not seen at the market for almost a decade." Steve Brennan, *NATPE Closes Bull Market*, The Hollywood Reporter, Jan. 27, 1995 at 1.

44 Nielsen Station Index, Nov. 1994.

45 David Tobenkin, *Top Three Markets Arm For Fall Battle*, Broadcasting and Cable, July 18, 1994 at 20. Some independent stations have also signed long-term agreements for these programs. See David Lieberman, *Affiliation Switches Turn Viewers Off*, USA Today, Feb. 7, 1995 at B1 (reporting that WB affiliate KTVK-TV (Phoenix, Arizona) has entered into a five-year \$100 million agreement with King World).

46 Steve Palley, Executive Vice President and Chief Operating Officer of King World, Oppenheimer Media and Entertainment Conference, Transcript at 46 (1992).

In sum, whatever contribution the off-network restriction may have made in assisting an "infant" first-run syndication industry to gain a foothold more than two decades ago, that industry is now sure-footed and no longer needs government protection. This, by itself, justifies elimination of the off-network restriction. In fact, however, the case for repeal is even stronger. Not only is the off-network restriction no longer needed, its preservation would affirmatively disserve the public interest, for the reasons discussed below.

B. Elimination Of The Off-Network Restriction Will Encourage Additional Entry Into, And Investment In, The Production Of Network Programming

In adopting PTAR, the FCC's primary goal was to spur the production of first-run syndicated programming. This goal has now been achieved. Eliminating the rule's off-network restriction will not, therefore, threaten the viability of the first-run industry. It should, however, encourage additional entry into, and investment in, the production of network programming. This, in turn, will serve the Commission's objective of promoting diversity in television broadcasting.⁴⁷

When PTAR was adopted, the impact on independent producers of *network* programming was not expressly considered. As explained above, in 1970, the network's license fee covered a producer's costs. Thus, any revenues that producers earned in syndication constituted profit. By contrast, deficit financing is the norm today, resulting in

⁴⁷ Indeed, in other proceedings, the Commission has emphasized its desire to promote "source diversity," which it defines as "a measure of the number of program originators." *Evaluation of the Syndication and Financial Interest Rules*, 8 FCC Rcd 3282, 3302 (1993), *aff'd*, 29 F.3d 309 (7th Cir. 1994).

deficits totalling as high as approximately \$20 million for half-hour series and \$35 million for hour series by the end of four years of a network run.⁴⁸ Off-network syndication has thus taken on a significantly more important role, because it is only here that a producer can recoup its costs and earn any profit.⁴⁹ Gaining clearances in one of the most valuable time periods -- specifically, the access period -- therefore has become of paramount importance.

1. The Off-Network Restriction Has Reduced Prices For Off-Network Product

The effect of the off-network restriction has been precisely what one would expect: the demand for off-network programs has been artificially constrained, consequently depressing prices for those programs. Producers are limited to marketing their off-network programs in the Top 50 markets during the access period to the 70 viable independent stations and 50 Fox affiliates that together comprise only 44 percent of the viable stations in those markets.⁵⁰ In other words, producers cannot offer their off-network shows to more than half of the stations in the country's 50 most populous television markets, and they are prohibited from offering their programs to the stations that are frequently the strongest in those markets.

48 These average deficits assume that a network orders 22 episodes per season, as is the current practice for most shows.

49 John Lippman, *Too Costly for Prime Time*, Los Angeles Times, Mar. 22, 1992 at D1.

50 Nielsen Station Index, Daypart Reportable Stations, Nov. 1994. We use the term "viable" stations to include only those stations that are potential purchasers of syndicated programs. We therefore exclude PBS, religious, foreign language, and home shopping stations, as well as stations that do not meet Nielsen minimum reporting requirements or that do not post a Nielsen audience sign-on/sign-off household rating of one or better, because they cannot afford to purchase recent, off-network syndicated programming. Viable stations do include affiliates of the incipient WB and UPN networks, because they continue to be purchasers of syndicated programs.

The emergence of the Fox network has served to reduce further the "shelf space" available for off-network programming in two ways. First, in a number of instances, Fox's network programming has supplanted off-network programs that some Fox affiliates had aired in prime time before Fox began delivering a full schedule of programs.⁵¹

Second, as Fox in-house shows have entered the off-network syndication market, the growing trend of airing these programs during the access period on Fox affiliates has reduced the shelf-space available for other off-network programs. For example, in November 1988, Fox affiliates in the Top 50 markets aired 85 half-hours of off-network (*i.e.*, off-ABC, CBS or NBC) programming in the Monday-Friday access hours. By November 1994, Fox affiliates reduced the number of independently produced programs (both off-network and independently produced off-Fox) they aired to only 50 half-hours. They replaced this independently produced programming with 28 half-hours of in-house off-Fox shows. *See* Figure 4. Thus, independent producers faced a 33 percent drop-off in demand over a six year period from 42 percent of their customer base in the Top 50 markets as a result of

51 Even in a time period in which Fox does not supply a network feed, Fox affiliates are airing fewer off-network programs. As Figure 3 illustrates, in November 1988, Fox affiliates in the Top 50 markets aired 33 half-hours of off-network programs in the Monday-Friday 10:00 p.m.-11:00 p.m. (E.S.T.) period. By November 1994, that number had decreased to 17 half-hours, a drop of almost 50 percent. This decrease is largely the result of the fact that since becoming Fox affiliates, these stations have increased the amount of local news they air -- from 12 half hours in 1988 to 39 half hours in 1994. *See* Figure 3.

The decrease in Fox affiliate demand for off-network programs will continue in late fringe as Fox affiliates supplant late night off-network programs with Fox's new late night programming that is scheduled to begin in the fall 1995. *See* Chicago Tribune, Jan. 23, 1995 at 14 ("Fox will launch a late night program in fall '95"). In November 1994, Fox affiliates in the Top 50 markets aired 37 half-hours of off-network programs in the Monday-Friday 11:00 p.m.-12:00 a.m. period.

programming of in-house off-Fox shows.⁵² Moreover, both in-house Fox programs (*e.g.*, *Simpsons*) and independently produced Fox programs (*e.g.*, *Married... With Children*) have been sold in syndication to non-Fox affiliates, thereby increasing the supply of programming competing for valuable shelf space in the access hour.

The sharply lower syndication fees paid for off-network sitcoms in recent years is a direct result of the expanding supply and shrinking demand for such programs. Average syndication fees for half-hour programs in 1994 were \$575,000 per episode, down from the 1989 average of \$1.3 million per episode. *See* Figure 5. This difference of \$725,000 per episode would be enough to finance the deficits of two or three other unsuccessful series.⁵³

The effects of these trends are increasingly being felt by independent program producers. For example, Twentieth Television ceased production of *Anything But Love*, which garnered respectable ratings for the two years of its network run, after determining that it would not earn enough in syndication to cover its costs.⁵⁴ As Lucie Salhany, then Chairperson of Twentieth Television explained, "we couldn't afford to keep funding deficits when a series has limited value in syndication."⁵⁵ In addition, one syndicator (MTM

52 Indeed, these statistics may understate the significance of losing Fox affiliates as purchasers of off-network programming. Many of the Fox affiliates were the top rated independent stations in their markets. *See Fox Network Begins to Take Shape*, *Broadcasting*, Aug. 4, 1986 at 44; *Life Among the High Rollers*, *Broadcasting*, May 13, 1985 at 36.

53 As noted earlier, deficits for network programs can range from \$225,000 per episode for a single half-hour program to as much as \$400,000 or more per episode for an hour program.

54 *See* Brian Lowry, *Lewis Preps New Sitcom For Fox*, *Daily Variety*, Oct. 7, 1992.

55 John Lippman, *Too Costly for Prime Time*, *Los Angeles Times*, Mar. 22, 1992 at D1.

Worldwide Distribution) tried to market a successful network show *Evening Shade* (14.5 rating and 22 share) for eighteen months. After being unable to get sufficient clearances in the off-network syndication market, the syndicator was forced to sell the program to its sister cable network, The Family Channel.⁵⁶

2. Elimination Of The Off-Network Restriction Will Encourage Entry And Investment In Network Prime Time Programming

The off-network restriction, by its very nature, artificially constrains the demand for off-network syndicated programming. Professors Williamson and Woroch explain that "programming is a durable good, and like any durable good, restrictions on its future availability and uses will reduce the value of this asset."⁵⁷ As explained above, the growth of deficit financing and the emergence of a successful fourth network have exacerbated the adverse economic consequences caused by the artificial constraints imposed by the off-network restriction. The president of MCA Television observed that changes in the economics of off-network syndication mean that "the economies of doing a show have to make sense more now than ever before. We're not going to make up these deficits down the road."⁵⁸ The necessary consequence of removing the off-network restriction's artificial constraint on program prices, therefore, will be to provide increased incentives to enter into, and invest in, the production of network prime time programming.

56 *"Evening Shade" Skips Syndication For Cable*, Electronic Media, May 2, 1994 at 3. The failure to syndicate the show successfully was in large measure related to the fact that syndicators failed to obtain commitments in the major markets, including New York and Los Angeles.

57 Williamson and Woroch at 25.

58 *Sitcom Syndicators Are Laughing Less*, Wall Street Journal, Jan. 24, 1992 at B1.